



C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4^e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

William Forrester et al.,

complainant,

and

International Association of Machinists and
Aerospace Workers,

respondent,

and

Air Canada,

employer.

Board File: 29285-C

Neutral Citation: 2012 CIRB 632

March 7, 2012

The Board was composed of Ms. Elizabeth MacPherson, Chairperson and Messrs. André Lecavalier and Norman Rivard, Members.

Parties' Representatives of Record

Mr. William Forrester representing himself and the lead case for 75 other complainants;

Mr. Boyd Richardson, for International Association of Machinists and Aerospace Workers; and

Mr. Fred Headon, for Air Canada

[1] During the period from February 13 to 21, 2012, the Canada Industrial Relations Board (the Board) received 76 similar complaints from members of the International Association of Machinists and Aerospace Workers (the IAMAW or the union) employed by Air Canada (the employer), alleging that the union had violated the duty of fair representation to which it is subject by virtue of section 37 of the *Canada Labour Code (Part I - Industrial Relations)* (the *Code*). Given that these duty of fair representation complaints all cite the same facts, the Board has consolidated them for the purposes of hearing and determination. A list of the complainants covered by this decision is appended as Annex A.

[2] The Board, composed of Ms. Elizabeth MacPherson, Chairperson and Messrs. André Lecavalier and Norman Rivard, Members, has considered the complaints, has determined that an oral hearing is not required and for the reasons that follow, has dismissed the complaints.

I-Background

[3] The IAMAW is the certified bargaining agent for several units of employees at Air Canada, including one comprised of:

all employees of Air Canada engaged in technical, maintenance and operational support functions, **excluding** those performing management functions or those employed in a confidential capacity in matters relating to industrial relations and otherwise, and **excluding** any employees covered by another certification order and employees in discrete positions and functions not included within the scope of bargaining units in either of the former Air Canada or Canadian Airlines International Ltd. prior to their merger.

[4] This unit is commonly known as the Technical Maintenance and Operation Support (TMOS) unit. It consists of three divisions: Technical Operations (Tech-Ops); Airports and Cargo Operations; and Logistics and Supply. The Tech Ops division is responsible for the servicing of Air Canada aircraft at bases across Canada (line maintenance) and consists of line maintenance technicians, electrical technicians, inspectors, technical writers, planners, instructors, millwrights and auto technicians. The Airports and Cargo Operations division is composed of station attendants (baggage and cargo handlers), aircraft cleaners, baggage and cargo agents, weight and balance agents and training instructors. The Logistics and Supply division is responsible for the procurement, storage, handling and distribution of parts and supplies.

[5] The collective agreement between Air Canada and the IAMAW for the TMOS unit expired on March 31, 2011. After a lengthy period of collective bargaining, which included the assistance of a conciliator appointed by the Minister of Labour, the parties reached a tentative agreement on a new contract on February 10, 2012.

II—Nature of the Complaints

[6] The complainants allege that the union acted in bad faith when it negotiated different terms and conditions for employees in the Tech Ops division from those it negotiated for the other employees in the bargaining unit and made concessions that adversely affect maintenance technicians. The complainants allege that the tentative agreement contained less favourable wage and vacation increases for members of the Tech Ops group and did not address issues that were of significant concern to this group. They also allege that the IAMAW did not advise the Tech Ops group's representative of the negotiation session that led to the tentative agreement and thus that their group was not represented at this critical meeting.

[7] The complainants request that the Board halt the ratification process and split the TMOS bargaining unit into two separate units: one for skilled maintenance employees, who are a minority in the current bargaining unit, and one for all of the other employees.

III—Analysis and Decision

[8] The Board takes note of the fact that the tentative agreement which formed the subject matter of these complaints was rejected by the union membership as a whole subsequent to the filing of the complaints. Nevertheless, the Board has determined that it is appropriate to rule on the complaints, as the circumstances which gave rise to them will inevitably recur in the future, given the composition of this bargaining unit.

[9] Section 37 of the *Code* provides:

37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

[10] Most complaints under section 37 of the *Code* relate to the handling of grievances alleging a violation of the collective agreement. However, on an exceptional basis, where the union's actions demonstrate an egregious and patently unreasonable failure to balance the interests of all its members in circumstances that touch on the very core of their employment relationship, the Board has extended the duty of fair representation to the collective bargaining process (see for example, *Cairns*, 1999 CIRB 35 and *Spragg*, 2011 CIRB 610).

[11] The Board's focus in a section 37 complaint is on the union's conduct: whether, in representing the complainant, the union acted in a manner that was free of arbitrary, discriminatory or bad faith conduct. The Board considers the union's internal decision-making process, not the merits of the complainants' demands. As the predecessor to this Board, the Canada Labour Relations Board (CLRB) stated in *Haley* (1981), 41 di 311; [1981] 2 Can LRBR 121; and 81 CLLC 16,096 (CLRB no. 304):

It is not the Board's task to reshape union priorities, allocate union resources, comment on leadership selection, second guess its decisions, or criticize the results of its bargaining. It is our task to ensure it does not exercise its exclusive majoritarian based authority unfairly or discriminatorily. Union decision makers must not act fraudulently or for improper motives such as those prohibited by human rights legislation or out of personal hostility, revenge or dishonesty. They must not act arbitrarily by making no or only a perfunctory or cursory inquiry into an employee's grievance. The union's duty of fair representation does not guarantee individual or group union decision makers will be mature, wise, sensitive, competent, effectual or suited for their job. It does not guarantee they will not make mistakes. ...

(pages 324; 131; and 615)

[12] The well-developed Board jurisprudence regarding section 37 of the *Code* requires a complainant to make out a *prima facie* case that the union has conducted itself in a manner that was arbitrary, discriminatory or in bad faith. The Board described this *prima facie* process in *Crispo*, 2010 CIRB 527 as follows:

[12] The Board conducts a *prima facie* case analysis for the numerous duty of fair representation cases it receives. This *prima facie* case analysis accepts a complainant's pleaded material facts as true and then analyzes whether those material facts could amount to a *Code* violation.

[13] The *prima facie* case analysis weighs the material facts as opposed to legal conclusions. A complainant who pleads a legal conclusion by alleging, for example, that certain conduct was arbitrary, discriminatory or in bad faith does not, by so doing, avoid the application of the *prima facie* case test.

[14] In *Blanchet v. the International Association of Machinists and Aerospace Workers, Local 712*, 2009 FCA 103, the Federal Court of Appeal endorsed the Board's use of a *prima facie* case analysis and its focus on the material facts:

[17] As a general rule, when a court presumes the allegations to be true, they are allegations of fact. That rule does not apply in findings of law: see *Lawrence v. The Queen*, [1978] 2 F.C. 782 (T.D.). It is for the court, not the parties, to determine questions of law: *ibidem*.

[18] It is true that, in the passage quoted, the Board did not specify that it was referring to the applicant's allegations of fact. However, the reference to the applicant's allegations cannot be anything other than a reference to allegations of fact. Otherwise, a complainant would need only to state as a conclusion that his or her union's decision was arbitrary or discriminatory for the Board to be forced to find that there had been a violation, or at least a *prima facie* violation, of section 37 of the *Code* and rule on the merits of the complaint. Thus, the complaint screening process would become a thing of the past.

[13] The *prima facie* test can be described as follows: if the Board accepts all of the complainant's factual allegations as true, could the Board find that the union violated section 37 of the *Code*? In applying this test, the Board recognizes that, during the course of collective bargaining, it is often necessary for both parties to make concessions and compromises in order to achieve a mutually acceptable resolution. From time to time, this means that certain interests have to be surrendered or compromised in order to obtain an agreement that is acceptable to a majority of the bargaining unit members. The Board recognizes that to achieve the overarching objective of the *Code*, namely constructive and harmonious labour-management relations, the interpretation and application it ascribes to section 37 of the *Code* must provide unions with considerable latitude to make the compromises necessary to resolve bargaining disputes. Consequently, the standard for establishing a *prima facie* violation of section 37 with respect to the representation of employees during collective bargaining is necessarily a very high one. To establish a *prima facie* violation of section 37 with respect to a union's conduct during collective bargaining, a complainant must demonstrate that the union's behaviour was tantamount to the complete absence of representation.

[14] In the instant case, the complainants have failed to make out a *prima facie* case of violation of section 37 with respect to the IAMAW's representation of their interests in the bargaining that

resulted in the February 2012 tentative agreement. While the union may not have achieved everything that the complainants may have wished for, the documents filed with their complaint clearly show that the union turned its mind to their concerns and negotiated the improvements that it was capable of achieving. The fact that there may be some variance in the results achieved for the different groups of employees within the unit reflects the union's appreciation of the labour relations realities of the workplace. As noted above, it is not the Board's role to determine what a union's bargaining priorities should be.

[15] As the complainants have failed to demonstrate that the union acted in an arbitrary, discriminatory or bad faith manner with respect to its representation of their interests during collective bargaining, the complaints are dismissed.

[16] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

André Lecavalier
Member

Norman Rivard
Member

ANNEX A

List of Complainants – File 29285-C

William Forrester
Ken Chapman
Denis Walsh
Gordon Sheppard
Ken Hickerson
Myles J. Klimek
Howard Badowich
Rick Kesler
Marino Pacentrilli
Nelson Colmenares
Ronald E. H. Mohr
Brian Davis
Richard Vaugeois
Malouk Fahmy
Paul Campbell
Ronald Rutschmann
Michael Trick
Eng Chiong Sy
John Gibbon
Daniel Bouthillier
Vahan Palouljian
Young Colin James
Mario Della Vecchia
Raynald Hallé
Léopold Tremblay
Jean Leroux
Michel Bailey
Heddy Boussandel
Michel Boudreau
Pierre A. Depatie
Philippe Mayette
Stan Pilch
Peter Krewerth
Dan Sadrick,
Paul F. Galvez
Claude Gill
Yves Theriault
Bert Simpkins

Charles Robert Buermans
Bernard Dorge
Ernest Frutros
Richard Chuckry
Garry Price
Geoffrey Stuart
Daryl Klassen
Mike Emms
Brian Jamieson
R. Todd Docking
Miles Johnson
William N. Dolinsky
Marc Lemoine
Scott E. Fairbairn
Mike Oswald
Perry Hunstad
Mary Unger
Mike Dubois
Ap Ng
Peter Poelstra
Willy Cortez
Earl Fried
Gordon McCone
Corey Wilcox
Makowski Pawel
Frederick Gupta
Sukhvinder Gill
Kevin Jespersen
Steve Ankner
Donald J. Mazur
Sukhdeep S. Dhaliwal
Frank Perrella
Gord Garvie
Michael Yorksi
David Sherriff
Kelly Derksen
Keith Johnson
Frank Langlois